No. 84-778 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND, PETITIONER

v.

BAXTER MACON

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer's entry into the public area of a commercial store and his purchase once inside of items freely offered for sale by the store constitutes a search or seizure regulated by the First or Fourth Amendment.

2. Whether a warrant is required to arrest an individual for the distribution of obscene materials.

3. Whether the Double Jeopardy Clause bars retrial of a defendant following reversal of his conviction on the ground that certain evidence critical to the sufficiency of the prosecution's case was improperly admitted at the first trial.

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INTEREST OF THE UNITED STATES

This case raises two important questions concerning the constitutional limitations, under the First and Fourth Amendments, on the ability of law enforcement officers to conduct investigations into the distribution of obscene materials. Several federal statutes govern the dissemination of obscene materials in interstate commerce and through the mails, 18 U.S.C. 1461, 1462, and 1465, and the federal government therefore has an interest in the constitutional principles that regulate this class of cases. The third question presented by the petition raises an issue under the Double Jeopardy Clause that would apply to any type of federal prosecution.

STATEMENT

Following a jury trial in the Prince George's County, Maryland, Circuit Court, petitioner was convicted of distributing obscene materials, in violation

of Md. Code Ann. art. 27, § 418 (1982) (Pet. App. 1a). Petitioner was fined $500 and was ordered to pay $75 in court costs (*ibid.*). On petitioner's appeal, the Maryland Court of Special Appeals reversed his conviction and ordered that the charging papers be dismissed (Pet. App. 1a-19a).

1. At approximately 7:00 p.m. on May 6, 1981, three Prince George's County detectives went to the Silver News, Inc., adult book store in Hyattsville, Maryland, in response to a series of complaints that the store had been selling adult books to juveniles (Tr. 77-78; see J.A. 39). The store windows were covered with paper to a point above the eye level of a person of average height (Tr. 79), so that passers-by could not see inside, but the store was apparently open to any member of the public interested in browsing or purchasing a book or magazine. Detective Ray Evans entered the store, browsed for a few minutes, and selected two magazines, which he purchased with a marked $50 bill supplied by the vice section (J.A. 38; Tr. 79, 81-84, 93-94, 112, 125).[1] After leaving the store, he showed the magazines to two other detectives waiting nearby (J.A. 29, 36; Tr. 84, 114), who concluded that the magazines were obscene under the criteria that they had previously used in warrant applications (J.A. 28; Tr. 84, 89-90). All three detectives returned to the store and arrested respondent, the only employee in the store,[2] for distributing obscene materials, in violation of Md. Code Ann. art. 27, § 418 (J.A. 27, 34-36; Tr. 112-113, 116-117). The detectives also recovered the $50

[1] The magazines were in an unsealed plastic container (Pet. App. 1a; Tr. 82-83, 86).

[2] Neither the circuit court nor the Court of Special Appeals made a finding as to whether respondent was the proprietor of the store or merely an employee.

bill that Detective Evans had used to purchase the magazines (J.A. 36, 37; Tr. 124). Respondent ushered out the remaining customers and locked the store before he was taken away by the detectives (Pet. App. 2a).

2. Prior to trial, respondent moved to suppress the magazines and the $50 bill on several different grounds (J.A. 4, 9-11, 17-20). After an evidentiary hearing,[3] the circuit court denied respondent's motion in an oral bench ruling (J.A. 39-45). The court held that Detective Evans' purchase of the magazines did not constitute a seizure (J.A. 41) and that respondent's warrantless arrest was lawful (J.A. 41-43). At respondent's trial, the State offered the magazines in evidence (Tr. 88), but it did not introduce the $50 bill seized incident to his arrest.

3. On respondent's appeal, the Maryland Court of Special Appeals reversed his conviction and ordered that the charging papers be dismissed (Pet. App. 1a-19a). Stating that the "primary question" was whether the detectives' warrantless arrest of petitioner was lawful (*id.* at 4a), the court ruled (*id.* at 4a-12a) that, because of the complexity of the definition of obscenity and the need to ensure that protected speech is not stifled, the First Amendment forbids the warrantless arrest of a person for distributing allegedly obscene materials. The court also rejected the State's argument that suppression was uncalled for because Detectives Evans had purchased the magazines. The purchase, according to the court, was a " 'preconceived seizure[]' " (*id.* at 13a (citation omitted)), and the entire episode was a "constructive[] seiz[ure]" of respondent's maga-

[3] The hearing on respondent's motion was combined with a hearing on several similar motions filed by other defendants who had also been charged in other cases with distributing obscene materials (see J.A. 39).

zines (*id.* at 14a). Suppression was also appropriate, the court ruled (*id.* at 17a-18a), because the arrest caused respondent to close the bookstore. In an effort to lessen the impact of its holding, the court expressly noted (*id.* at 19a n.2) that its ruling was based solely upon the First Amendment and did not constitute a modification of established Fourth Amendment doctrine. Finding that, without the magazines, the evidence was insufficient to support respondent's conviction, the court ordered that the charging documents be dismissed (Pet. App. 19a, citing *Burks* v. *United States*, 437 U.S. 1 (1978)). The Maryland Supreme Court denied review, and this Court granted the State's petition for a writ of certiorari on January 14, 1985.

SUMMARY OF ARGUMENT

1. The Court of Special Appeals erred in holding that the magazines purchased by the detectives must be suppressed. Law enforcement officers do not need a warrant to enter the public areas of a commercial building or to purchase items that the business freely sells. The detectives' possession of the magazines was thus not a seizure regulated by the Fourth Amendment. Nor does the First Amendment provide any basis for suppressing this evidence. The First Amendment does not generate a legitimate expectation of privacy either in general or as to the type of premises that the officers entered in this case. Indeed, its purpose is just the opposite: to protect the right of public dissemination of ideas. Moreover, the First Amendment contains no exclusionary rule, and it surely does not require that conduct that was entirely lawful at the time it occurred retroactively be deemed unlawful.

2. There is no need to decide in this case whether a law enforcement officer may effect a warrantless

arrest of a suspect for the distribution of obscene materials. Even if respondent was unlawfully arrested, the detectives were nonetheless legitimately in possession of the magazines introduced at trial, and the only evidence that the detectives secured by virtue of respondent's arrest was not received in evidence at trial. Because there were no "fruits" of that arrest admitted into evidence, it is immaterial to this case whether respondent's arrest was lawful.

In any event, respondent's arrest was lawful. The Fourth Amendment allows the police to make warrantless arrests if no search of a private area is needed to effect the arrest. The First Amendment does not forbid this practice because a warrantless arrest for the distribution of obscene materials, unlike a seizure of those items, is not tantamount to a prior restraint. Moreover, because the Fourth Amendment requires a magistrate promptly to determine whether a warrantless arrest was supported by probable cause, a law enforcement officer's judgment that certain publications or films are obscene will not go unreviewed.

3. The petition also presents the question whether, once an appellate court has determined that certain evidence critical to the sufficiency of the prosecution's case was erroneously admitted, the Double Jeopardy Clause bars retrial on that charge. The Court would need to reach this issue only if it first upholds the ruling of the court below that the magazines were improperly admitted. Even in that event, however, we believe that this is not an appropriate case in which to resolve this important issue of double jeopardy law because a decision on that issue in the State's favor will not enable the State to conduct a retrial of the respondent if it cannot use the evidence that

the court below ordered suppressed. Respondent was charged with distributing obscene materials, and it appears to be legally impossible to prove such a charge without some evidence of the distribution of or the contents of the magazines; indeed, the State has not suggested that there is in fact any way for it to proceed with a retrial even if it were permitted to do so. Accordingly, this issue is of mere academic interest to the parties and need not be resolved in this case.

Should the Court reach the issue, however, we think it clear that the Double Jeopardy Clause does not bar a retrial at which the prosecution would be free to offer other evidence, if such evidence were available, to substitute for the evidence that was erroneously admitted at the first trial. When a court finds that all of the evidence adduced at the first trial fails to prove a defendant's guilt and the court enters a judgment of acquittal, the policy of the Double Jeopardy Clause to protect a defendant from further prosecution is applicable. Here, however, the evidence at trial, though perhaps legally defective for reasons unrelated to the historic fact of respondent's guilt or innocence, can hardly be said to have failed to establish his guilt. The relevant double jeopardy policy is therefore not implicated by allowing a retrial. If the prosecution can substitute other, legally-competent evidence for the evidence that was improperly admitted at a defendant's first trial, society's interest in convicting the guilty outweighs any possible interest the defendant can invoke against retrial.

ARGUMENT

I. THE MARYLAND COURT OF SPECIAL APPEALS ERRED BY SUPPRESSING THE MAGAZINES PURCHASED BY THE DETECTIVES

In this case, the Maryland Court of Special Appeals held that the magazines purchased by Detective Evans must be suppressed because respondent's ensuing warrantless arrest for the distribution of obscene materials was unlawful. That analysis, in our opinion, is seriously flawed in several respects. For the reasons given below, because neither the Fourth nor the First Amendment requires a law enforcement officer to obtain a warrant before purchasing books or magazines from a store, the detectives were lawfully in possession of the magazines that were introduced in evidence at respondent's trial. Nothing in this Court's jurisprudence or sound policy justifies collapsing this lawful conduct into the subsequent events or dispensing with the uniform precondition to suppression of evidence that its procurement be causally related to the alleged illegality. Accordingly, it is immaterial to this case whether respondent was lawfully arrested.

A. Law Enforcement Officers Do Not Need To Obtain A Warrant Before Entering The Public Areas Of A Commercial Building And Purchasing Items That Are Freely Offered For Sale

1. The Fourth Amendment does not regulate every action that a law enforcement officer takes in investigating crime; rather, the Amendment, by its terms, applies only to "searches and seizures." Those terms limit the scope of the Fourth Amendment and, in so doing, also describe different types of conduct: a search occurs only when the government intrudes on a person's legitimate expectation of privacy, while a

seizure takes place when the government substantially interferes with a person's liberty or his possessory interests in property. See, *e.g.*, *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7; *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6-7; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979). The Fourth Amendment also does not permit the courts to adopt an undifferentiated approach to the question whether a sequence of discrete actions taken by the police constitute either a search or a seizure. On the contrary, the Court's decisions make clear that each action must be separately examined to determine whether it falls within the scope of the Fourth Amendment. See, *e.g.*, *United States* v. *Karo*, slip op. 6-12; *United States* v. *Jacobsen*, slip op. 8-16; *United States* v. *Knotts*, 460 U.S. 276, 282-283 (1983).

Here, Detective Evans entered respondent's bookstore, browsed for a few moments, and purchased two magazines before conferring with his partners and, ultimately, deciding to arrest respondent. The only evidence that the detectives secured as the product of respondent's arrest, however, was the original $50 bill that Detective Evans had used to purchase the magazines, and that bill was not introduced in evidence at trial. Hence, because there were no "fruits" of that arrest admitted at trial, there is no reason for the Court to decide whether respondent's warrantless arrest was lawful, and, unless Detective Evans committed an unlawful search or seizure to obtain the magazines prior to respondent's arrest, there is no basis for invoking the exclusionary rule in this case.

a. To begin with, it is clear that Detective Evans' entry into respondent's store did not constitute a

search. Even though law enforcement officers are normally required to obtain a search warrant before inspecting the private areas of a business (see, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978)), it is well established that police officers, like private parties, are entitled to accept a business's general invitation to the public to enter its commercial premises, even if the officers do not intend to transact business. See *Donovan* v. *Lone Steer, Inc.*, No. 82-1684 (Jan. 17, 1984), slip op. 5; *Lewis* v. *United States*, 385 U.S. 206, 211 (1966); *id.* at 213 (Brennan, J., concurring); cf. *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984) (open fields surrounding a house); *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) (open fields surrounding a business); see generally *Katz* v. *United States*, 389 U.S. 347, 351 (1967) ("[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").[4] Moreover, because "[a] commercial

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[4] As the Court explained in *Lewis*, "[a] government agent, in the same manner as a private person, may accept an invitation to do business and enter upon the premises for the very purposes contemplated by the occupant" (385 U.S. at 211). See also *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1354-1355 (5th Cir. 1979); *United States* v. *Brandon*, 599 F.2d 112, 113 (6th Cir.), cert. denied, 444 U.S. 837 (1979); *United States* v. *Blalock*, 578 F.2d 245, 247 (9th Cir. 1978); *United States* v. *Berrette*, 513 F.2d 154, 156 (1st Cir. 1975); *United States* v. *Berkowitz*, 429 F.2d 921, 925 (1st Cir. 1970); *United States* v. *Williams*, 328 F.2d 887 (2d Cir.) (per curiam), cert. denied, 379 U.S. 850 (1964); *Fisher* v. *United States*, 205 F.2d 702 (D.C. Cir.), cert. denied, 346 U.S. 872 (1953); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 357 (1974). It is immaterial in this respect whether the invitation is viewed as an indication that the proprietor has no expectation of privacy under *Katz* in the public areas of his premises or as consent

establishment when open to the public is open for all legitimate purposes" (*United States* v. *Berkowitz*, 429 F.2d 921, 925 (1st Cir. 1970)), so long as the officers do not exceed the limits of their invitation—for instance, by entering after business hours or by rummaging through a firm's business records—they may lawfully observe whatever is in plain view once they are inside. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 315 (footnote omitted) ("[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well"). Finally, that law enforcement officers are not in uniform when they enter the premises is immaterial in this regard, because the Fourth Amendment does not protect a person's misplaced confidence that the persons with whom he transacts business are neither the police nor a threat to his criminal activities. See *United States* v. *Karo*, slip op. 10 n.4; *id.* at 3-4 (O'Connor, J., concurring in part and concurring in the judgment); *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Osborn* v. *United States*, 385 U.S. 323, 326-331 (1966); *Hoffa* v. *United States*, 385 U.S. 293, 300-303 (1966); *Lewis* v. *United States*, *supra*; *Lopez* v. *United States*, 373 U.S. 427, 437-439 (1963). The detective's presence in respondent's bookstore was thus entirely lawful.

b. Nor did Detective Evans' purchase of the two magazines constitute a seizure for purposes of the Fourth Amendment. The sale of an item, like the abandonment of that item, necessarily entails the owner's relinquishment of any further possessory interest. A police officer's purchase of a magazine, like his purchase of narcotics, therefore implicates no

to the public to enter his premises. See *United States* v. *Karo*, slip op. 3 (O'Connor, J., concurring in part and concurring in the judgment).

Fourth Amendment concern. See *Texas* v. *Brown*, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in the judgment); *Lewis* v. *United States*, 385 U.S. at 211; *Abel* v. *United States*, 362 U.S. 217, 241 (1960) (abandonment); cf. *United States* v. *Matlock*, 415 U.S. 164 (1974) (consent). Hence, unless the First Amendment requires a different result, the detectives were lawfully in possession of the magazines prior to respondent's arrest, and the Court of Special Appeals erred in ordering that evidence to be suppressed.[5]

2. The Court of Special Appeals' reversal of respondent's conviction hinges upon its conclusions that the First Amendment establishes different rules for police conduct in this area (Pet. App. 19a n.2) and that the two magazines purchased by Detective Evans must be suppressed to ensure that respondent would not lack a remedy for what it found to be an illegal arrest in this case (Pet. App. 12a-15a). That analysis is unsound.

a. To begin with, the First Amendment does not bar undercover law enforcement officers from enter-

[5] Most state courts to consider the question have ruled in similar circumstances that a law enforcement officer's purchase of a book or a similar item for the purpose of determining whether it is obscene does not constitute a seizure of the item. See *Peachtree News Co.* v. *Slaton*, 226 Ga. 471, 472-474, 175 S.E.2d 539, 540 (1970); *People* v. *Ridens*, 51 Ill.2d 410, 416-417, 282 N.E.2d 691, 695 (1972), vacated and remanded on other grounds, 413 U.S. 912 (1973); *State* v. *Welke*, 216 N.W.2d 641 (Minn. 1974); *State* v. *Flynn*, 519 S.W.2d 10, 12 (Mo. 1975); *State* v. *Dornblaser*, 26 Ohio Misc. 29, 35-37, 267 N.E.2d 434, 438 (1971); *Cherokee News & Arcade, Inc.* v. *State*, 533 P.2d 624, 626 (Okla. Crim. App. 1974); *Goodwin* v. *State*, 514 S.W.2d 942, 944 (Tex. Crim. App. 1974); cf. *State* v. *Barrett*, 278 S.C. 92, 97-98, 292 S.E.2d 590, 593, cert. denied, 459 U.S. 1021 (1982) (no seizure under state law). Contra, *State* v. *Furuyama*, 64 Hawaii 109, 637 P.2d 1095 (1981).

ing the public areas of a commercial building or from purchasing items that a business freely offers for sale. The principal purpose of the First Amendment, of course, is protection of the *public expression* of ideas. Although the First Amendment, in some circumstances, protects privacy of belief or association where doing so is essential for effective political expression (see *Buckley* v. *Valeo*, 424 U.S. 1, 64-66 (1976)), the First Amendment merely protects legitimate expectations of privacy that stem from an independent source. The First Amendment does not by itself give rise to a privacy interest where no reasonable person could expect one (cf. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978)), and there surely is no basis for concluding that the proprietors or employees of a commercial establishment that is open to the public possess a legitimate expectation of privacy in this regard. Where a business invites the public, either expressly or by necessary implication, to enter upon the premises at will, as respondent did in this case, the invitation demonstrates that the proprietors, and, a fortiori, the employees, do not expect to retain a privacy interest in the open portions of the business premises. If so, there is plainly no reason for the First Amendment independently to give rise to an expectation of privacy that the proprietors and employees themselves do not possess.

That Detective Evans purchased the magazines " 'as part of a single planned transaction' " (Pet. App. 13a (citation omitted)) is also immaterial in this regard. As the Court made clear in *Scott* v. *United States*, 436 U.S. 128, 136 (1978) (emphasis in original), while a police officer's "motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a * * * constitutional violation has been established," the question whether

a constitutional violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." See also *id.* at 137-138. For that reason, Detective Evans' intent at the time he entered respondent's store or when he purchased the magazines is irrelevant to the question whether those actions constituted a search or seizure.

To be sure, it is established that First Amendment concerns should be taken into account in determining what is reasonable under the Fourth Amendment (see *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965)), so that in some circumstances there are special rules applicable to searches for or seizures of books, films, or papers. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). But these remain Fourth Amendment rules, and they govern only conduct that constitutes a search or a seizure. Accordingly, unless a law enforcement officer's conduct can reasonably be classified as either a search or a seizure, the Fourth Amendment, even as amplified by the First, does not regulate that activity.

b. The Court of Special Appeals also erred by retrospectively applying the exclusionary rule in blatant disregard of the normal cause-and-effect relationship between events. As this Court explained only last Term, "[i]t is clear that the cases implementing the Exclusionary Rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.' " *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), slip op. 11 (emphasis in original), quoting *United States* v. *Crews*, 445 U.S. 463, 471 (1980); see also, *e.g.*, *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 17-20;

McGuire v. *United States*, 273 U.S. 95, 98-100 (1927). The First Amendment plainly does not require a different result. Because Detective Evans' purchase of the magazines violated no First or Fourth Amendment right of respondent's, there is no reason to exclude them from evidence at trial. Cf. *United States* v. *Payner*, 447 U.S. 727, 734-737 (1980) (suppression is equally inappropriate under the Fourth Amendment or a federal court's supervisory powers where the government's conduct violated no right of the defendant). What is more, even if the First Amendment were to require that evidence obtained in violation of its strictures be suppressed in some instances, there is surely no rational basis for a rule that the First Amendment requires suppression of validly obtained evidence because of some later, causally-unrelated infringement of First Amendment rights.[6] The Court of Special Appeals therefore erred by ordering the magazines to be suppressed.

To be sure, respondent, like any citizen, may be entitled to be free from harassment or from an improperly motivated investigation. But the court of appeals did not point to any evidence in this case that

[6] There also appears to be no basis at this time for the court's forecast that "permit[ting] the warrantless arrest in this case to go unremedied would merely license a continuation of this practice" of making warrantless arrests for the distribution of obscene materials (Pet. App. 18a). Prior to the court's decision, state law enforcement officers were not required to obtain a warrant to arrest a suspect for the distribution of obscene materials, and there is surely no reason to presume that police officers will ignore judicial decisions limiting police investigatory practices. While there is, as we show below, no need in this case to decide whether a warrant is required in such circumstances, there is also no need to exclude evidence that law enforcement officers have lawfully obtained prior to the existence of such a ruling, on the ground that the police will later ignore the new rule.

would support such a claim—it did not, for instance, question that respondent in fact committed the offense for which he was arrested—and there is no reason to presume that the detectives' actions were spurred by illegitimate concerns. The only action taken by the detectives that the Court of Special Appeals found offensive to any constitutional value was their warrantless arrest of respondent. Whatever effect that may have on respondent's prosecution as a matter of state law, it is entirely clear there is no basis in either the First or Fourth Amendment for the court's ruling requiring suppression of the magazines that respondent freely parted with prior to his arrest.[7]

[7] The Court of Special Appeals also erred in relying upon *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), and *Penthouse Int'l, Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980). In *Bantam Books*, a state commission sent notices to book distributors that certain books were obscene, which, the state trial court found, had the effect of compelling the distributors to cease selling the books to retailers and to withdraw all outstanding books from retailers. 372 U.S. at 63-64. Accepting the trial court's finding that a distributor's "compliance with the Commission's directives was not voluntary" (372 U.S. at 68), the Court ruled that the Commission's directives constituted an unlawful prior restraint (*id.* at 68-72). Detective Evans' purchase of books freely offered for sale is not remotely similar to the facts of *Bantam Books*. The Fifth Circuit's decision in *Penthouse Int'l* upheld a district court's issuance of an injunction where the activities of local law enforcement authorities in making warrantless arrests after purchasing allegedly obscene magazines "constituted a calculated scheme of warrantless arrests and harassing visits to retailers" (610 F.2d at 1361) that amounted to a "constructive seizure" of the magazines (*id.* at 1359) and an unlawful prior restraint under *Bantam Books* (610 F.2d at 1359-1362). The court did not find that the purchases themselves were unlawful or suggest that items purchased by law enforcement officers would be subject to suppression at trial; rather, the court was con-

B. The Question Whether Respondent Was Lawfully Arrested Will Not Affect The Outcome Of This Case And Therefore Ought Not To Be Resolved In This Proceeding

1. For the reasons given above, the detectives lawfully possessed the magazines that were purchased from respondent's store, and the state circuit court therefore properly admitted those items in evidence at respondent's trial. The only evidence that the detectives acquired by virtue of respondent's arrest was the $50 bill that they had used to purchase the magazines, but that bill was not received in evidence. It is thus unnecessary for the Court to decide at this time whether the First or Fourth Amendment requires that a neutral and detached magistrate, rather than a law enforcement officer, assess the sufficiency of the evidence to arrest a suspect for distributing obscene materials. There will be time enough to resolve the arrest issue in a case that requires it; this one, however, does not.

2. Were that question before the Court, however, we would submit that neither the First nor the Fourth Amendment requires an antecedent judicial determination of probable cause to arrest a person for the sale of obscene materials.

a. The Court's decisions construing the Fourth Amendment Warrant Clause recognize a sharp constitutional distinction between searches and seizures. As noted above (pages 7-8, *supra*), a search involves an interference with a person's legitimate expectations of privacy. Because "the ruptured privacy of the victims' homes and effects cannot be restored" once an unlawful search has occurred (*Linkletter* v.

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cerned with the legality of the warrantless arrests, which need not be decided in this case.

Walker, 381 U.S. 618, 637 (1965)), law enforcement officers are generally required to secure a warrant before they may conduct a search (see, *e.g.*, *United States* v. *Karo*, slip op. 11). A seizure, by contrast, represents an interference with an individual's possessory interests in property. The consequences of an erroneous seizure—deprivation of possession of the property—are not nearly as severe as in the case of an erroneous search and are remediable by ordering restoration of unlawfully seized property to its owner. See Fed. R. Crim. P. 41. For that reason, law enforcement officers may ordinarily seize property in plain view without a warrant if they have probable cause to believe that it is either contraband or evidence of a crime. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 6; *United States* v. *Jacobsen*, slip op. 11-12; *Texas* v. *Brown*, 460 U.S. 730, 738, 741-742 (1983) (plurality opinion); *id.* at 748 (Stevens, J., concurring in the judgment); *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). Indeed, the Fourth Amendment allows the police to make a warrantless, probable-cause seizure of a person (*i.e.*, an arrest) in a public place. See *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976).[8]

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[8] While the Court has never directly addressed the issue, its decisions have clearly indicated that a police officer may also make a warrantless arrest for a misdemeanor committed in his presence. See *Welsh* v. *Wisconsin*, No. 82-5466 (May 15, 1984), slip op. 1 (White, J., dissenting); *United States* v. *Watson*, 423 U.S. at 418; *Carroll* v. *United States*, 267 U.S. 132, 156-157 (1925); cf. *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 16 n.9; see also 2 W. LaFave, *Search and Seizure* § 5.1 (1978); W. LaFave, *Arrest* 17 (1965). Article 27, Section 594B, of Maryland Code authorizes a police officer to make a warrantless arrest for a misdemeanor committed in the officer's presence. See Pet. 3.

However, because First Amendment considerations must be taken into account in defining what is reasonable under the Fourth Amendment (page 13, *supra*), the Court has recognized an exception from the latter rule for books or similar materials and has required a judicial determination of probable cause before such items may be seized. See *Roaden* v. *Kentucky*, 413 U.S. 496, 502-503 (1973) (collecting cases). As the Court explained in *Roaden*, "the common thread * * * [of those decisions] is to be found in the nature of the materials seized and the setting in which they were taken" (413 U.S. at 503). The Fourth Amendment requires antecedent judicial review of the sufficiency of the evidence to support a seizure of books because a seizure is tantamount to a prior restraint of communications that may be protected by the First Amendment (see 413 U.S. at 503-504; see also *Zurcher* v. *Stanford Daily*, 436 U.S. at 566-567), a harm equal in degree to that resulting from an unlawful search.

b. Contrary to the view of the Court of Special Appeals, however, that exception cannot automatically be applied in the context of an arrest. Rather, the Court's decisions make clear that, because "the overarching principle * * * embodied in the Fourth Amendment" is one of " 'reasonableness' " (*United States* v. *Villamonte-Marquez*, No. 81-1350 (June 13, 1983), slip op. 9), which "is not capable of precise definition or mechanical application" (*Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)), the specific context in which an issue arises must be closely examined in order to balance the particular interests involved (see, *e.g.*, *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 10; *United States* v. *Villamonte-Marquez*, slip op. 9, 13-14; *Terry* v. *Ohio*, 391 U.S. 1, 9 (1968)). We submit that, on balance, the rule

adopted by the Court of Special Appeals is unwarranted.

The Court of Special Appeals concluded (Pet. App. 17a-18a) that the warrantless arrest of respondent was tantamount to a prior restraint because it caused him to close the bookstore. A warrantless arrest does not directly or inevitably lead to that result, however. That it did in this case was purely fortuitous because respondent happened to be the only employee in the store at the time. But *any* arrest of respondent on *any* charge—whether for distributing obscene materials or for distributing narcotics—would have had that effect. Clearly, however, respondent would have enjoyed no immunity from arrest or prosecution for the latter crime due simply to the nature of his employment. See *Branzberg* v. *Hayes*, 408 U.S. 665, 682-683, 691-692 (1972). Hence, unless the First and Fourth Amendments arbitrarily forbid warrantless arrests of the store's only employee in such circumstances, the ruling below therefore cannot be justified because of the incidental effect that arrest had in this case upon First Amendment interests.[9]

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[9] In fact, because respondent may only have been a clerk, rather than the proprietor of the store, it is dubious whether he may invoke whatever First Amendment interest a proprietor may have in keeping the store open, because respondent's sole interest in this respect would be economic, not communicative. Otherwise, *any* arrest of *any* suspect for *any* crime would give rise to a First Amendment claim, because any arrest limits a person's opportunity to engage in activities protected by the First Amendment, at least for the duration of the period that he is in custody. Furthermore, a variety of other crimes such as conspiracy, obstruction of justice, or threats against federal officials, such as the President, may implicate speech or associational rights that are protected by the First Amendment. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Watts* v. *United States*, 394 U.S. 705 (1969). This Court has never suggested, however,

The rule adopted by the Court of Special Appeals is also overbroad in another respect. Presumably, the court intended that its rule would apply to every warrantless arrest for the distribution of obscene materials. If so, that rule would forbid warrantless arrests in circumstances in which there is no realistic possibility that an arrest could amount to a prior restraint, such as where a person is arrested after closing the store and while he is on his way home. In ~~that~~ case, however, the concerns that prompted this Court to create a special exception to the Fourth Amendment rule governing the warrantless seizure of items are wholly absent. The Court of Special Appeals' extension of that rule to the case of warrantless arrests thus unjustifiably limits a police officer's recognized authority promptly to apprehend a suspect for the commission of a crime, provided that no search of a private area is necessary to effect the arrest.

To be sure, there is some force to the argument that, because the definition of obscenity is sometimes difficult to apply, a neutral and detached magistrate, rather than a law enforcement officer, should decide whether there is probable cause to arrest a person for the distribution of a particular, allegedly-obscene book or film. But that does not appear to be the primary objection to this practice; nor was it the chief reason that this Court gave for creating an exception to the normal rule permitting a warrantless seizure of items that a law enforcement officer has probable cause to believe constitute contraband or evidence of a crime, which was that the seizure amounts to an unlawful prior restraint (see *Roaden* v. *Kentucky*, 413 U.S. at 504). A warrantless arrest will not have

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that the First Amendment imposes any limitation upon a law enforcement officer's arrest powers simply because the crime under investigation may have a communicative aspect to it.

that effect except in the situation in which, fortuitously, the suspect happens to be the only employee in the store. And even in that case, because a warrantless arrest must be followed by a hearing at which a magistrate will determine whether the arrest was supported by probable cause (see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)), a police officer's determination that a particular book or film is obscene will be promptly reviewed by a court. On balance, therefore, we submit that neither the Fourth nor the First Amendment forbids the warrantless arrest of a suspect for the distribution of obscene materials.

II. RESPONDENT'S RETRIAL PRESENTS NO DOUBLE JEOPARDY PROBLEM IF THE EVIDENCE AGAINST HIM CAN BE DEEMED INSUFFICIENT ONLY AFTER DISCOUNTING PORTIONS OF THE STATE'S EVIDENCE

1. The final issue presented by the petition is whether the Double Jeopardy Clause forbids a retrial when an appellate court concludes that certain items of evidence were unlawfully admitted at trial, and the remaining evidence is insufficient to support the verdict. Because of the manifest error of the court below on the suppression issue, there should be no occasion to reach that issue here. But even if the Court were to affirm the ruling below suppressing the magazines, this case would still be an inappropriate vehicle for the Court to decide this important and recurring issue of double jeopardy law, because the issue is of only academic interest to the parties to this case.

Respondent was charged with the distribution of obscene materials, and it appears to be legally impossible for the State to prove that charge without introducing into evidence the magazines themselves. As the petitioner in this Court, the State must dem-

onstrate that a ruling in its favor on the double jeopardy issue will provide it with some form of relief. But if the lower court's suppression ruling is sustained, both the magazines themselves and, presumably, the detectives' observations of what the magazines contained must be excluded. The State has not suggested any way in which it could proceed with a retrial in those circumstances even if it were permitted to do so by securing a ruling in its favor on the double jeopardy issue, nor has it suggested that it has any intention to reprosecute. Hence, because a favorable ruling from this Court on the double jeopardy question coupled with an unfavorable ruling on the First and Fourth Amendment questions in the petition will afford the State no relief, the State is seeking little more than an advisory opinion from this Court regarding the conduct of future prosecutions. Cf. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-13. Accordingly, we do not believe that there is any reason for the Court to resolve this question even if the Court were to affirm the suppression ruling of the court below.

2. Should the Court reach the issue, however, we think it clear that the Double Jeopardy Clause does not bar a retrial where an appellate court reverses a conviction on the ground that the trial court erroneously admitted certain evidence, even where that evidence is crucial to proof of the government's case.

Burks v. *United States*, 437 U.S. 1, 16-18 (1978), held that a judgment of acquittal entered by an appellate court on the ground that the totality of the evidence is insufficient to support the verdict, unless overturned on further review, is entitled to the same preclusive effect under the Double Jeopardy Clause as a jury (or trial court) verdict of acquittal. However, the companion case of *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), expressly left open the question

whether the clause would also bar a retrial following a reversal of a conviction where some of the prosecution's evidence is found to have been erroneously admitted and the remaining, legally competent evidence was insufficient to support the conviction. Since *Greene* v. *Massey* was decided, every federal court of appeals to consider the question has held that such a circumstance does not erect a bar to retrial. See *United States* v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), cert. denied, No. 83-5063 (July 5, 1984); *United States* v. *Chesher*, 678 F.2d 1353, 1357-1359, 1364 (9th Cir. 1982); *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir.) (per curiam), cert. denied, 459 U.S. 834 (1982); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980); *United States* v. *Mandel*, 591 F.2d 1347, 1371-1374, vacated en banc on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); accord, *State* v. *Longstreet*, 619 S.W.2d 97, 100-101 (Tenn. 1981). We submit that the appellate decisions upholding the government's right to retry a defendant where a crucial part of the evidence is subsequently held to have been erroneously admitted, leaving the remainder of the evidence insufficient to support a conviction, were correctly decided.

This Court's decisions do not support the ruling of the Court of Special Appeals. As the Court has often made clear, the Double Jeopardy Clause provides a defendant with three protections: it shields him from having to undergo reprosecution despite the existence of a final judgment of conviction or acquittal for the same offense, from having a first trial improvidently terminated prior to receipt of the verdict, and from being subjected to multiple punishments for the same offense. See, *e.g.*, *Richardson* v. *United States*, No. 82-2113 (June 29, 1984), slip op. 6-7; *Justices*

of Boston Municipal Court v. *Lydon*, No. 82-1479 (Apr. 18, 1984), slip op. 11 & n.6; *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). The only one of these protections that is relevant to this case is the right not to be retried for an offense of which the defendant has previously been acquitted. But respondent has not been acquitted, and nothing in the decision of the Court of Special Appeals even remotely suggests that he was in fact not guilty. In addition, the Double Jeopardy Clause does not entitle a defendant to demand that a judgment of acquittal be entered at any particular point in the criminal process. See *Richardson* v. *United States*, slip op. 6-9; *Justices of Boston Municipal Court* v. *Lydon*, slip op. 12-14. This Court's decisions thus provide no support for the proposition that a retrial is barred simply because the evidence that the appellate court finds to have been properly admitted is insufficient by itself to support the conviction.

Nor do the values underlying the Double Jeopardy Clause support that result. A finding of residual insufficiency under those circumstances is not tantamount to a judgment of acquittal, but is simply a description of the effect of the finding of trial error. As the Court explained in *Burks*, reversal based on trial error represents merely "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect," such as the "incorrect receipt or rejection of evidence * * * [;] it implies nothing with respect to the guilt or innocence of the defendant" (437 U.S. at 15). Moreover, *Burks* acknowledged that the reasons why retrial has long been permitted where reversal is due simply to trial error are compelling (437 U.S. at 15, quoting *United States* v. *Tateo*, 377 U.S. 463, 466 (1964)):

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."

See also *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

As Justice Brennan stated in his dissent in *Richardson* v. *United States*, slip op. 5 (emphasis added), "[t]he fundamental principle underlying *Burks*, and indeed most of our double jeopardy cases, is that the prosecution is entitled to one, and only one, *full and fair opportunity* to convict the defendant." Where the totality of the government's evidence is found to be insufficient, as was the case in *Burks*, the government has had its one "full and fair opportunity" to convict those who have violated its laws (*ibid.*; see also *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)), and it is rightly denied another. Where, however, evidence held to be admissible at trial is later deemed inadmissible, it is neither overreaching nor oppressive to allow the government an opportunity to proceed again, this time under correct rules of law.

If a trial court grants, rather than erroneously denies, a suppression motion or sustains any other objection to the introduction of evidence upon which the government intends to rely to prove an essential element of its case, the prosecution has timely notice of the need to supplement its case and remedy the evidentiary defects. Where, however, the government is misled as to the need to adduce substitute or additional evidence because the error is not uncovered until appeal, the evidence actually introduced by the government "does not necessarily reflect all other available evidence of the defendant's involvement. It is impossible to know what additional evidence the government might have produced had the faulty evi-

dence been excluded at trial, or what theory the government might have pursued had the evidence before the jury been different." *United States* v. *Harmon*, 632 F.2d at 814; see *United States* v. *Sarmiento-Perez*, 667 F.2d at 1240. To deny the government the right to retry the defendant would place the government at its peril in relying on trial court evidentiary decisions and would jeopardize the retrial of numerous defendants whose guilt may not be in doubt but whose convictions have been reversed for erroneous admissions of evidence.

The courts of appeals have recognized that substantial policy considerations militate against barring retrials in these circumstances. As the Seventh Circuit observed in *United States* v. *Tranowski*, 702 F.2d at 671:

> A contrary conclusion would lead the government to "overtry" its cases—to introduce redundant evidence of the defendant's guilt—in order to insure itself against the risk of not being able to retry the defendant should some of its evidence be held on appeal to be inadmissible. It would also require the court of appeals, in every case where it reversed a conviction because of erroneous admission of evidence, to determine the sufficiency of the remaining evidence—something the court would otherwise be required to do only if the government argued harmless error.[10]

[10] Some courts have held, after *Burks*, that the reviewing court is required to decide whether the totality of the evidence was sufficient even where there might be other grounds for reversal that would not preclude retrial. See *United States* v. *United States Gypsum Co.*, 60[illegible] F.2d 414, 416 (3d Cir.), cert. denied, 444 U.S. 884 (1979); *United States* v. *Till*, 609 F.2d 228, 229 (5th Cir.), cert. denied, 445 U.S. 955 (1980); *United States* v. *Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978); *United States* v. *Orrico*, 599 F.2d 113, 116 (6th Cir. 1979); *United States* v. *Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980); *United States* v. *Vargas*, 583 F.2d 380, 383 (7th Cir. 1978); *United States* v. *McManaman*, 606 F.2d 919, 927 (10th Cir. 1979). Whether or not such determinations are required as a matter of law, it is clear that to expand the bar against retrial to cases involving the erroneous admission of evidence (where the totality of the evidence establishes the defendant's guilt) would vastly increase the frequency and complexity of appellate evaluations of evidentiary sufficiency.

And the Ninth Circuit has pointed out that barring retrials in these circumstances would injure the rights of defendants as well as the government (*United States* v. *Harmon*, 632 F.2d at 814, quoting *United States* v. *Tateo*, 377 U.S. at 466):

> "[I]t is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests."

In this case, of course, reprosecution seems entirely impractical, and perhaps legally impossible, without the suppressed evidence (see pages 21-22, *supra*). But often that will not be true, and any general rule should not be based upon the unique obstacles to retrial that happen to exist here. Nor is it appropriate to create a narrower rule that precludes retrial whenever the appellate court is unable to discern how the prosecution could replace the improperly admitted evidence. An appellate court must base its decision on the record before it, and the record does not normally disclose all of the evidence that the government may have had at hand but elected, for one reason or another, not to offer into evidence. To enter a judgment of acquittal in these circum-

stances would require an appellate court to speculate whether the government has additional evidence that would support a prosecution. And, from a practical standpoint, declining to enter a judgment of acquittal also would not significantly threaten defendants with unjustified retrials, because it is highly unlikely that the government would seek a retrial where an appellate court has excluded evidence that is both crucial to its case and irreplaceable. Accordingly, were the Court to reach this issue, we submit that the Double Jeopardy Clause should not be construed to bar a retrial where an appellate court finds that certain items of evidence, essential to the prosecution's case as it was presented at the first trial, were improperly admitted.[11].

CONCLUSION

The judgment of the Maryland Court of Special Appeals should be reversed.

Respectfully submitted.

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[11] Were the Court to adopt such an exception, however, it should be limited to cases in which the evidence found to have been erroneously admitted *both* (a) is an essential and unique item of proof *and* (b) is inadmissible on any other basis (or with a different foundation).

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